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IN THE

Supreme Court of the United States

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, BERNADETTE BERNABEI, ANNETTE FOSTER-HALL, *et al.*,

Petitioners,

v.

AMERITECH BENEFIT PLAN COMMITTEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL EMPLOYEE RIGHTS INSTITUTE (NERI), NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA), AND THE OHIO NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plan administrator's fiduciary duties under ERISA are breached when the administrator perpetuates pregnancy discrimination?

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INTEREST OF THE AMICI CURIAE[1]

The NATIONAL EMPLOYEE RIGHTS INSTITUTE (NERI) is a non-profit 501(c)(3) organization serving all employees nationwide. NERI helps individuals, both employed and unemployed, understand, enforce and expand their rights in the workplace. NERI provides information, education, and assistance to individual employees and promotes public policies to advance employee rights. NERI provides resources to other organizations, unions and civil rights groups that help employees.

As an organization that helps employees enforce their rights, NERI is deeply concerned that all forms of discrimination in the workplace be eliminated. Pregnancy discrimination is one of the many ways in which women have been treated unfairly in the workplace. Current decisions by pension plan fiduciaries that perpetuate pregnancy discrimination harm many thousands of employees. NERI seeks to help these employees by participating as *amicus curiae*.

The NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) is a voluntary organization, founded in 1985, of over 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership

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1. The parties have consented to the filing of this brief; this written consent has been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *Amici Curiae* state that counsel for the parties have not authored this brief in whole or in part. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Kolstad v. American Dental Association*, 527 U.S. 526, 119 S. Ct. 2118 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); and *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998).

The OHIO NOW LEGAL DEFENSE AND EDUCATION FUND (Ohio NOW LDEF) is a non-profit corporation originally founded in 1981 by the trustees of the Ohio Chapter of the National Organization of Women. The Ohio NOW LDEF provides assistance to bring women into full participation in all activities of American life and conducts research and education concerning discrimination in our society. As part of its activities, the Ohio NOW LDEF provides legal counsel or other support to victims of employment discrimination and conducts regular programs to prevent discrimination. It and the Ohio NOW Chapter have been granted leave to file an *amicus* brief in numerous cases before the Ohio Supreme Court.

The Ohio NOW LDEF is particularly concerned that women not be discriminated against because of pregnancy in the provision of employee pension benefits. The Ohio NOW LDEF recognizes that current decisions of plan fiduciaries are perpetuating pregnancy discrimination against women and denying them valuable opportunities to retire and to enhance their level of retirement benefits. In addition, many of the women affected by the fiduciary decisions at bar, as well as other similar existing lawsuits, are residents of Ohio. For these reasons, the Ohio NOW LDEF seeks to participate as *amicus curiae*.

STATEMENT OF THE CASE

This case arises out of a new early retirement program, the Ameritech Pension Plan Enhancement Program (APPEP), offered by Ameritech to its employees in 1994.[2] The APPEP, in part, amended the Ameritech Pension Plan (the Plan) which is governed by ERISA. The amendment gave an additional three years service and three years of age to employees, enabling certain otherwise-unqualified employees to qualify for immediate retirement benefits under the plan.

The critical issue in this case was the amount of service credit, or "term of employment," under the Plan for women who had taken pregnancy leaves of absence prior to 1979, the effective date of the Pregnancy Discrimination Act (PDA). The Plan granted the administrator, an ERISA fiduciary, "full discretionary authority to interpret the terms

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2. Also involved in this litigation are early retirement programs and amendments to the Ameritech Management Pension Plan in 1992 and 1993.

of the Plan and to determine eligibility for an entitlement to benefits in accordance with plan terms." (Ameritech Pension Plan (as amended Jan. 1, 1994) § 3, ¶ 4, p. 15).[3] The Plan granted the administrator the power to decide a participant's "term of employment," so long as the decision was based on plan documents and was consistent with the law. *Id.* § 6, ¶ 3, p. 97. No Plan provision required that pregnancy leaves be excluded from "term of employment" calculations.

After the APPEP was adopted, some 1400 women challenged denials of benefits for failure to include in their service calculation all time they were off work on pre-PDA pregnancy leaves. The administrator denied the claims relying on Plan language that it interpreted to require the administrator to accept leave of absence determinations made pursuant to company policies in effect at the time of the leave. That interpretation was disputed below. However, even if this were the case, the plan also gave the administrator the power to "make administrative changes in the Plan, as well as changes which, in the opinion of the [administrator], [we]re required . . . or made desirable by federal or state statutes, regulations or rulings applicable to the plan." *Id.* § 9, ¶ 1, p. 120.[4]

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3. The text of the Plan was in the Court of Appeals record as Joint Exhibits, Vol. I, Ex. 3.

4. In the past, the administrator had, in fact, exercised its authority to make administrative changes to the plan. For example, in the early 1970's the administrator made an administrative change to retroactively grant service credit to workers who were out of work due to a strike, even though the plan terms did not otherwise provide for such service credit.

Instead of exercising its discretion to include time for leaves of absence due to pregnancy prior to 1979, the administrator relied on an historical service calculation system applicable to the **Ameritech company**, not to the **plan**. This historical, "net credited service" system excluded much of the pregnancy leave time taken by women prior to 1979, while at the same time it included all of the disability time taken by men prior to 1979. The 1994 early retirement plan amendment did not adopt this system nor require the administrator to use this system in calculating an employee's "term of employment." Thus, the administrator's decision to apply this discriminatory system was an act that perpetuated pregnancy discrimination against women. The administrator's decision affected thousands of women, many of whom were not able to retire early in 1994, yet it permitted similarly situated men to retire early.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Writ to Resolve a Split in the Circuits

The decision in the court below directly and irreconcilably conflicts with *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992). *Pallas* recognized that perpetuation of pregnancy discrimination constituted a breach of fiduciary duty,[5] while the court below rejected that holding.

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5. ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries . . . ," *inter alia*. 29 U.S.C. § 1104(a)(1)(A)(i).

Early retirements have been denied female participants in pension plans solely because years earlier they took pregnancy leave. Throughout the 1980's, 1990's and today, employers have frequently used early retirement incentives to achieve desired employment levels. These incentives facilitate ending a career in a manner that is often mutually satisfactory to employer and qualifying employee. As companies offer more opportunities for their employees to retire early, the discrimination of the past is often revisited upon women through current eligibility decisions. Women who bore children were at one time forced out of the workforce and treated less favorably than male employees absent from work with other disabilities. Plan Administrators are now making current retirement benefit decisions that perpetuate that same discrimination against women, under early retirement plans, by denying the service credit that similarly-situated men receive. The result: women are deprived of better retirement benefits by this current act of pregnancy discrimination.[6]

Plan Administrators are typically afforded discretion, and were actually given such discretion in this case, to interpret plans. As in other cases, the Administrators here failed to use the discretion given them to interpret length of service favorably to these women, instead relying on the company's discriminatory "net credited service" system that favors one set of employees (disabled men) over another set (pregnancy disabled women).

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6. There was no evidence in the record below that giving credit for past pregnancy leaves would jeopardize the fiscal viability of this plan. The amount of service credit involved is relatively small in terms of the number of covered employees, but the service credit is critical to female employees who are otherwise qualified for these plans. Moreover, because the employer seeks to entice employees with such plans, broadening the pool of eligible employees would actually serve its objective.

These exact discrimination-perpetuating decisions have led to a great deal of litigation. A clear split in the Circuits has now emerged. The Ninth Circuit, in *Pallas*, held that "[d]iscrimination constitutes a fiduciary breach for purposes of ERISA." *Id.* at 1327. Now under nearly identical facts, the Seventh Circuit in the case below found that there was no fiduciary breach. *Ameritech Benefit Plan Comm. v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000) (Pet. App. 17a-19a).[7]

A. The Split In the Circuits

1. Courts Holding that Discrimination Constitutes a Fiduciary Breach under ERISA

In *Pallas v. Pacific Bell*, the Ninth Circuit considered a case with nearly identical facts to those in the case at bar. The plaintiff in *Pallas* challenged the discriminatory denial of service credit under a 1987 early retirement plan. The plan fiduciary failed to include the plaintiff's service time for leaves of absence due to pregnancy that occurred prior to passage of the PDA in 1979. Rather, the fiduciary used the company's discriminatory service calculation system that denied women credit for pregnancy leave while awarding credit to men who missed work due to other disabilities. 940 F.2d at 1326. The court determined that the 1987 amendment "adopted, and thereby perpetuated, acts of discrimination . . ." *Id.* at 1327. The Ninth Circuit, relying on *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert denied*, 464 U.S. 813 (1983), held that

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7. In this brief, references to the Appendix of Petitioner's Brief shall be abbreviated "Pet. App."

"[d]iscrimination constitutes a fiduciary breach for purposes of ERISA."[8] *Pallas*, 940 F.2d at 1327.

Two District Courts in the Sixth Circuit agree with *Pallas* and follow its reasoning. In *Carter v. AT&T*, 870 F. Supp. 1438 (S.D. Ohio 1994), *vacated by consent of the parties*, 1996 WL 656571 (S.D. Ohio Sept. 13, 1996), the court considered a similar issue involving an early retirement plan of AT&T. In *Carter*, the Plaintiff was denied early retirement benefits in 1993 because the Plan fiduciary failed to credit her with service time for a forced pregnancy leave she had taken in 1966-1967. The court first held that both the "[early retirement] enhancement system enacted by AT&T and **AT&T's denial of credit for pregnancy leave** violate[d] Title VII." *Id.* at 1444 (emphasis added). Because the court found that the Defendant discriminated on the basis of gender under Title VII in denying service credit for the pregnancy leave, it also found that the plan administrator breached its ERISA fiduciary duty by failing to determine the plaintiffs service in a non-discriminatory manner. *Id.* at 1446-48 (citing to *Pallas*, 940 F.2d at 1327).

The Court in *Sweeney v. Employees Benefit Committee of Ameritech Publishing Co.*, No. 93-CV-74302 (E.D. Mich. Mar. 2, 1996), *vacated by stipulation and order*, (E.D. Mich. May 17, 1996) (Lodging App. L-1 – L-18), carried this analysis a step further. In *Sweeney*, the plaintiff challenged one of the plans at issue in the case at bar, the 1992 enhancement program. This plan was also administered by an Ameritech plan fiduciary. As in the case at bar, the plan administrator

8. *Pallas* was a 2-1 split decision in most respects. However, the dissenting judge agreed with the majority on the ERISA fiduciary breach issue, making the decision unanimous on that issue. *See Pallas*, 940 F.2d at 1329.

refused to give the plaintiff service credit for her pregnancy leave and instead denied her claim relying on the company's pre-PDA pregnancy leave policies. The court held that the exercise of discretion that discriminatorily denied her service credit for time on pregnancy leave constituted a fiduciary breach. Most notable, however, was that the plaintiff did not bring a simultaneous Title VII claim to challenge the conduct but relied solely on ERISA. Despite the lack of a supporting gender discrimination claim, the Court held "the Defendant's discriminatory application of the 1966/1967 maternity leave policy was arbitrary and capricious and does constitute a fiduciary breach under section 1104 of ERISA." (Lodging App. L-13)

2. Courts Holding that Discrimination Is not a Fiduciary Breach Under ERISA

Here the Seventh Circuit took a very different approach to the issue of fiduciary breach and pregnancy discrimination. Employees in the case at bar, like the plaintiffs in *Pallas*, *Carter* and *Sweeney*, were denied benefits under a post-PDA early retirement plan. These female employees too would have qualified for early retirement benefits had the plan fiduciary included service time while they were off on maternity leave (prior to 1979). The Seventh Circuit rejected the notion that such discrimination constituted a breach of fiduciary duty.[9] Rather, the court held that adherence to the historical method of calculating service satisfied its duty to

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9. While the court below did not categorically reject the concept that discrimination could constitute a fiduciary breach under ERISA, it did so under facts indistinguishable from *Pallas*, *Carter*, and *Sweeney*, and it gave little hint under what circumstances it might find a fiduciary breach. *Ameritech*, Pet. App. 18a-19a.

act in the best interests of the participants as a whole.[10] (Pet. App. 19a)

In *Redding v. AT & T Corp.*, No. 96-WY-807-CB (D. Colo. July 25, 1996), *aff'd*, 1997 WL 537882 (10th Cir. Sept. 2, 1997) (unreported) (Lodging App. L-19 – L-24), the District of Colorado also addressed the issue of whether discrimination constituted a fiduciary breach.[11] In finding no fiduciary breach, the Court stated "Redding's first claim fails because ERISA does not provide a cause of action for civil rights violations. The proper vehicle for a cause of action based on gender discrimination is Title VII, and the proper vehicle for a cause of action based on pregnancy discrimination is the PDA." (Lodging App. L-21) (citations omitted). Thus, the court held as a matter of law that

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10. Interestingly, the court recognized that fiduciaries had a duty of loyalty similar to common law trustees. In addition, the court stated that "[a] common-law trustee was not allowed to favor one class of beneficiaries over another." Pet. App. 19a. (citing Restatement of Trusts § 183). Yet, the court turned this notion of favoritism of classes on its head, implying that the prohibited "favoritism" would consist of upsetting the historical calculation system and crediting this group of women with service for time spent on pregnancy leave. *Id.* Apparently, the court did not view crediting men for time away from work due to non-pregnancy-related disabilities as favoritism.

11. *Redding* involved slightly different facts from the other cases cited above. In *Redding*, the Plaintiff apparently was not challenging her length of service under an early retirement plan, but rather under the company's regular retirement plan. Ms. Redding had taken 12 pregnancy-related leaves of absence amounting to 854 days off. The case was dismissed under Fed. R. Civ. P. 12(b)(6). The difference between early retirement and normal retirement does not, however, affect the existence of a breach of fiduciary duty.

discrimination in plan interpretation could not constitute a breach of fiduciary duty.[12]

This Court should take this case to resolve the split in the Circuits.

B. This Court's Opinion In *Shaw v. Delta Airlines* Has Contributed To The Confusion Below

In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), this Court decided, *inter alia*, that ERISA preempted the parts of a state fair employment practices law that, prior to

12. It could be argued that certain language in the district court opinion indicates that the court would follow the *Pallas* line of cases under different facts. Specifically, the court stated:

> Redding tries to avoid this statutory rule by arguing that her claims are based on the plan administrators' decision in 1995 to deny Redding's request for service credits. This argument might work if the administrators had done something other than refer to the plan provisions in effect during the time of Redding's maternity leaves, and determine that under those plans she was not entitled to such credits. The administrators did not exercise any discretion in making this decision. They simply relied on the terms of the plans governing the calculation of Redding's credits.

(Lodging App. L-21 – L-22) Thus it could be argued that if the plan fiduciary had exercised discretion in this case that the court would have recognized an action for fiduciary breach. However, the quote comes from the section of the opinion wherein the court addresses the time of accrual of the cause of action. It does not address the substance of the fiduciary breach claim on which the court, as quoted above in the text, was quite clear. The Plan at bar afforded discretion to its administrators in interpreting how to calculate service credit.

enactment of the federal PDA, prohibited discrimination in employer benefit plans on the basis of pregnancy.

In the opinion, this Court stated in dictum: "ERISA does not mandate that employers provide any particular benefits, and **does not itself proscribe discrimination in the provision of employee benefits**." *Id.* at 91 (emphasis added). This statement by the Court has caused some confusion. The Court was undoubtedly referring to settlor functions, such as the act of creating or amending a plan, when it referred to discrimination.[13] *Id.* at 97 (referring to the preempted human rights law "which prohibits employers from **structuring** their employee benefit plans in a manner that discriminates on the basis of pregnancy") (emphasis added).

This Court's statement about ERISA's proscription of discrimination was unsurprising because, as this Court has made clear, such settlor functions are not fiduciary acts and thus are not subject to ERISA's stringent fiduciary duties. *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996). However, at least two of the lower courts mentioned above have interpreted the language from *Shaw* more broadly. For example, the District Court in *Redding* cited the above language from *Shaw* in dismissing the plaintiff's fiduciary breach claim. (Lodging App. L-21). In addition, the Seventh Circuit in the case at bar noted that "there may be a problem with shoe-horning a discrimination claim in to the ERISA notion of fiduciary duty, because ERISA 'does not itself proscribe discrimination in the provision of employee benefits.' " *Ameritech*, Pet. App. 18a (citing *Shaw*, 463 U.S.

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13. A decision to discriminate against protected groups in plan implementation or amendment may, of course, violate Title VII or some other discrimination law.

at 91). While the Seventh Circuit noted that the *Shaw* Court did not address whether discrimination could ever constitute a breach of fiduciary duty, its opinion still indicates some uncertainty over the *Shaw* language. *Id.* 18a-19a.

This Court has previously recognized that ERISA's "fiduciary duties draw much of their content from the common law of trusts . . ." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). In addition the Court has recognized that Congress intended the courts to develop a body of federal common law based on trust principles. *Id.* (citations omitted) ("with respect to the trust like fiduciary standards ERISA imposes, Congress 'expected that the courts will interpret this prudent man rule (and other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans,' (citations omitted), as they 'develop a 'federal common law of rights and obligations under ERISA regulated plans.' ").

One fiduciary standard under the common law of trusts is the duty to deal impartially between two or more beneficiaries. Restatement (Second) of Trusts § 183 (1959) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.") The Seventh Circuit has adopted this fiduciary standard into the ERISA common law. In *Summers v. State Street Bank & Trust Co.*, 104 F.3d 105 (7th Cir. 1997), the court said that it would be a breach of fiduciary duty under ERISA to favor active employee participants over retired employee participants. The court stated: "It would be picking and choosing among beneficiaries, in violation of the traditional duty imposed by trust law of impartiality among beneficiaries." *Id.* at 108 (citing Restatement (Second) of Trusts § 183).

If discrimination between active and retired employees is a breach of fiduciary duty under ERISA, then certainly discrimination on the basis of pregnancy, which is proscribed specifically by federal law, must also be a breach of fiduciary duty. This conclusion is implicit in the interpretation of fiduciary obligations by the Department of Labor:

> Plan fiduciaries are responsible for administering their plans to assume compliance with both ERISA and other applicable federal laws, in recognition that such other laws are not pre-empted by ERISA. See 29 U.S.C. § 1144(d). Similarly, where the terms of a plan are consistent with ERISA, but are not consistent with requirements of other applicable federal laws or regulations, plan fiduciaries should take appropriate steps to assure that the plan is amended to comply with all applicable legal requirements . . . Thus . . . non-compliance [with another federal] statute and regulations issued thereunder would not be excused on the basis that the plan is in compliance with ERISA.

Department of Labor Opinion Letter 93-23A (1993 WL 349626).[14]

Furthermore, pregnancy discrimination by an ERISA fiduciary may not be actionable under any other federal law.

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14. The DOL interpretation of the ERISA fiduciary duty is entitled to great weight since DOL administers ERISA. *Chevron USA v. Natural Resources Council*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

Indeed, it is unclear whether, under all circumstances, a plan fiduciary fits the definition of an "Employer" under either Title VII or the Equal Pay Act. *See* 42 U.S.C. § 2000e(b); 29 U.S.C. § 203(d). It is unlikely that Congress intended fiduciaries to escape liability for acts that would otherwise constitute unlawful discrimination.

This Court should take the opportunity to clarify its statement in *Shaw* and at the same time determine whether the fiduciary duty of impartiality is properly a part of the federal common law of ERISA.

II. Review of the Decision Below is of Tremendous Importance to Women Nearing Retirement Age[15]

Gender is a critical hidden factor in the retirement security equation. Women tend to receive significantly lower pension benefits than men. Any fiduciary decision that reduces benefits to women obviously exacerbates the disparity. Thus, review of the decision below is of major importance to countless thousands of women who rely heavily on employee pensions in retirement.

Indeed, women usually have more at stake than men do in their retirements. On average, women live seven years longer than men and thus need financial resources for a decisively longer period.[16] The general population is also

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15. Much of the text in this section was taken from an *amicus* brief that AARP attempted to submit in the Seventh Circuit below.

16. Women lived on average 7.4 years longer than men in 1980; 6.8 years in 1988; and women can expect to live 6.9 years longer than men by 2010. *See* Women's Bureau, U.S. Dep't of Labor, *1993 Handbook on Women Workers: Trends & Issues*, at 149 (1994).

getting older, and it is becoming more female as it does — women account for more of the nation's over-65 population than men,[17] a trend which is expected to continue.[18]

Retirement benefits are calculated based on wage levels and length of service, but women get paid approximately seventy-five percent of men's earnings for comparable work. *See* Women's Bureau, U.S. Dep't of Labor, *Equal Pay: A Thirty-Five Year Perspective*, at 14 (June 1998) (women continue to earn about 76 cents for every dollar earned by men).[19] Older women receive fewer benefits in retirement in part because they received lower wages while working.

Pay inequity is due, in part, to pregnancy and family leave. *Women's Pay Gap Still Not Closed*, Newsday, Apr.

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17. The most recent estimates of the population by the Bureau of Census indicate that almost 13% of the U.S. population is over age 65. Of those over 65 in 1998, more than 20 million are women; some 14 million are men. Bureau of the Census, U.S. Dep't of Commerce, *Recent Population of the United States: Estimates, by Age and Sex* (visited Nov. 2, 1998) <http://blue.census.gov/population/estimates/nation/intfile2-1.txt>.

18. Due to the aging of the baby-boomers (those born between 1946 and 1964), projections indicate that by 2010 there will be more than 39 million people over age 65, 22.5 million of whom will be women; by 2030 the number jumps to 70 million overall, with 38 million being women. *Id.* at <http://blue.census.gov/population/projections/nation/nas/npas>. *See also* Linda J. Waite, *The Demographic Face of America's Elderly*, 33 Inquiry 220, 220 (Fall 1996).

19. Median annual earnings in real dollars for year-round, full-time workers was $32,144 for men and $23,710 for women, a difference of over $8,000. *Id.* App. B, at 58.

14, 1998, at A70.[20] Taking time off to bear and care for children, as well as to care for sick relatives, not only contributes to the pay differential, but also results in forfeiting seniority and pay increases. Pat Swift, *A Way to Figure What the Pay Gap Will Cost You*, The Buffalo News, Sept. 12, 1998, at 13B. Moreover, women earn less than men in 99% of all occupations. *See* Women's Bureau, U.S. Dep't of Labor, *Equal Pay: A Thirty-Five Year Perspective*, *supra*, at 30. Even in occupations traditionally dominated by women, men earn substantially more. Pat Swift, *The Gap is Closing But the Inequity in Pay Remains*, The Buffalo News, Mar. 28, 1998, at 7C.

Women fall short of their male counterparts in retirement income security. Those over 65 years old had 41% less real income than men in 1994. Employee Benefit Research Inst., *EBRI Databook on Employee Benefits*, at 50, tbl. 6.1 (4th ed. 1997) (women drew $8,950; men $15,250). The immediate cause of this difference is evident — women receive less money than men from all three major sources of retirement income. They draw lower Social Security benefits, receive less from employer-based pensions, and tend to save fewer dollars for retirement.

Older women receive less in private pension benefits than older men. Employer-provided pensions comprise between one-quarter and one-third of total retirement income,

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20. Ann Scott Tyson, Another Day, Another 75 Cents, Where Women Stand — 150 Years After the Women's Rights Movement Began, Christian Science Monitor, July 17, 1998, at 7. See generally AFL-CIO, Equal Pay: Facts About Working Women (visited Nov. 2, 1998) <http://135.145.13.100/women/wwfacts.htm>; see also U.S. Gen. Acc't Office, Social Security Reform, Implications for Women's Retirement Income (GAO/HEHS-98-42, Dec. 1997).

depending on marital status, for those individuals receiving such benefits. In 1995, the median pension benefit amount for women was considerably less than for men.[21]

This disparity remains with women as they age — in 1996, half of all older women drawing a private pension received less than $3,679 per year, compared with $6,442 per year for older men. AFL-CIO, *Fact Sheet: Equal Pay and Retirement* (visited Nov. 2, 1998) <http://135.145.12.100/women/retiremt.htm>. This disparity is attributable both to women spending less time in the workforce than men in large part because of family care giving responsibilities as well as pay inequity. Employee Benefit Research Inst., *EBRI Databook on Employee Benefits*, at 63 (4th ed. 1997).

Against this background, perpetuation of pregnancy discrimination in the current calculation of service credit is simply unconscionable. Whatever the lawfulness of that discrimination prior to the PDA, today's pension plan participants are owed a fiduciary duty under ERISA that precludes such discrimination.

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21. Employee Benefit Research Inst., *EBRI Databook on Employee Benefits*, 65-66, tbls. 81 & 82 (4th ed. 1997) (women 65-and-older received $4,200; men $7,800).

CONCLUSION

This case presents an issue of great importance to tens of thousands of women who bore children before 1979 and who are now reaching early retirement age. If the Court does not act now, the opportunity to correct this injustice will pass as the pre-PDA generation leaves the workforce. These women are entitled to the fiduciary protections that Congress set forth in ERISA. The issue of whether perpetuating pregnancy discrimination is a breach of fiduciary duty has split the Circuits and desperately needs resolution by this Court. For these reasons the Writ should be granted.

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